IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 898 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
ISHWAR DANA RABARI - Opponent(s)

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Appearance :
MR KC SHAH, ADDL. PUBLIC PROSECUTOR for Appellant(s) : 1,
MR TEJASH BAROT, for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 09/10/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. Heard ld. APP Mr. KC Shah for the State. The State has preferred the present Criminal Appeal under Section 378 of CrPC challenging the judgment and order of acquittal dated 12.05.1986 passed by the ld. Sessions Judge, Banaskantha at Palanpur in Sessions Case No.50/1985, whereby the ld. Trial Judge has acquitted the respondent accused from the offence punishable under section 302 of the Indian Penal Code.

2. The Appellate State has assailed the order of acquittal dated 12.05.1986 mainly on the grounds mentioned in para-4 of the memo of the appeal and ld. APP Mr. KC Shah has taken us through all those grounds and also has taken us through the impugned judgment and order of acquittal. The say of ld. APP Mr. Shah is that the findings recorded by the ld. Trial Judge are erroneous because there is no sufficient evidence as to the motive of the crime. The cloths of the accused when he was arrested, was stained with blood. These cloths were recovered in

presence of panchas and on analysis by the FSL expert, it was found that they are stained with the human blood having a group of the blood that was of the blood group of the deceased and one important witness has seen the accused running away after commission of the offence and that witness is PW-3 Babuji Mahobataji had chased the accused, but he could not intercept the escaping accused. That the important incriminating aspects have not been considered in the correct perspective by the ld. Trial Judge and the finding recorded by the ld. Trial Judge is based on palpably wrong and erroneous appreciation of evidence.

3. Ld. APP Mr. Shah has taken us through the oral evidence led by the prosecution witnesses including the hostile witnesses and other documentary evidence i.e. post-mortem notes, arrest panchanama of the accused, panchanama of recovery of cloths of the accused, panchanama drawn under section 27 of the Evidence Act under which the investigating agency recovered the muddamal weapon referred to by the ld. Trial Judge as either “Dharia” or “Vansi”. It is clarified by the ld. APP Mr. Shah that “Dharia” and

“Vansi” both are identical type of weapons having practically similar shape. He has also taken us through the finding recorded by the FSL expert qua the muddamal cloths and muddamal weapon. It is the say of the ld. APP Mr. Shah that the weapon recovered if is found stained with the blood of the group of the blood of the deceased, ld. Trial Judge ought to have held the accused guilty of the offence of murder punishable under section 302 of Indian Penal Code.

4. On the other hand, ld. Counsel Mr. Tejas Barot appearing for the respondent accused has submitted that there is no legal evidence to link the accused with the crime. Some basic story is found created and on suspicion, the accused should not be linked with the crime. For the sake of arguments if it is accepted that the cloths allegedly recovered from the body of the person of the accused had some stains of the blood, that by itself is not a sufficient circumstance to link the accused with the crime especially when the investigating agency had never taken out the blood of the accused for the purpose of analysis and there is no evidence to show that the blood of the accused is not of the group of the blood

of the deceased. After all, the accused is an agriculturist. When all these aspects are found considered in a balanced way by the ld. Trial Judge, this Court at least should not disturb the judgment and order of acquittal after a period of about 20 years. There is no element of either perversity or illegality in the findings and on the contrary the findings are based on sound reasons. The prosecution has even not satisfactorily established the time of the death of the deceased and this lacuna takes the case of the prosecution under a thick shadow of doubt.

5. To appreciate the arguments placed before us, firstly, we would like to state in brief the case of the prosecution that was placed before the trial Court. As per the say of the complainant Nagjibhai Mohan, they were four brothers and they are staying separately, but they are cultivating a parcel of land jointly. Deceased Popatbhai was working in their field on crop-share basis popularly known as “Bhagiya”. One brother of the complainant was previously working with the accused. When deceased Popatbhai was working in the field, he was seen

dealing lightly with the sister of the accused namely Menaben and was found teasing her and taking amusement while talking with the sister of the accused. Therefore, deceased Popatbhai was relieved from the assignment and he was replaced by his brother Manabhai. It is the say of the prosecution that as Manabhai was having some social function in his in-laws' family, he was to go to attend that social function and so temporarily, Popatbhai -deceased was asked to attend the work in the field of the accused and his brother. Popatbhai took over the charge of the work of Manabhai and had worked for some days, but on one day i.e. on 08.06.1985 when Popatbhai was moving towards the residence of the accused so as to get the after-noon meal, the accused followed him, had chased him and intercepted him when he was on village-side road popularly known as ”Neliya” covered by the hedge from both the sides. According to the prosecution, two persons had seen the accused moving towards Popatbhai having Dharia/Vansi in his hand. So, both these witnesses namely P.W.4 Teja Masharu and P.W.5 Jora Masharu informed P.W.3 Babuji Mahobataji about the same. PW Nos. 4 & 5 are the real brothers. So, on getting information about the movement of the accused, PW

Babuji Mahobataji went in that direction and he had seen the accused going away with a weapon in his hand, as alleged by him. He attempted to chase the accused, but he could not. This witness Babuji Mahobataji then moved in a direction where Popatbhai had gone i.e. towards village side and he found Popatbhai lying in injured condition on earth having various injuries on his body.

6. Popatbhai was lying dead. He was taken to the hospital and ultimately the complainant lodged a formal complaint against the accused.

7. After investigation, the accused came to be chargesheeted of the offence punishable under section 302 of the IPC and at the end of the trial, the ld. Trial Judge acquitted the accused saying that there is no sufficient evidence to link the accused with the crime vide judgment which is under challenge.

8. In our opinion, the evidence of Babuji Mahobataji is most relevant evidence because this witness i.e. PW3 Babuji claims that he had seen the accused running towards waste land on the west of the village pond. He has said that he and PW 4 & 5 namely

Jora and Teja who informed him about the incident, they chased the accused up to the village pond, but as they could not intercept him, they all returned back and thereafter found the body of the deceased lying in the neliya i.e. village side road. The plain reading of the deposition of this witness creates one impression that probably he is posing himself to be an eye witness, but actually he has not seen anything and he had not even attempted to chase and intercept the accused. In the examination-in-chief itself, in para-3, he has said that when they reached near the body of Popatbhai who was lying at the distance of about 150 ft., two other persons, four children and one Nagji were standing there.This Nagji is the complainant. When Nagji and other independent persons had gathered there on the spot where deceased Popatbhai was lying, why any of these persons/witnessed have not stated that they had seen the accused either assaulting the deceased or running away from the spot, is the question and this question has not been answered by this witness PW3 Babuji. The complainant Nagji has never claimed that he is an eye-witness of the incident. No other witness including the children who were standing near the body of Popatbhai, is examined. It appears that

their statements probably even have not been recorded otherwise IO ought to have clarified this contingency. The answers given during the course of cross-examination of this witness fortifies the situation that PW3 Babuji Mahobataji is not an eye-witness to any event that has occurred. The ld. Trial Judge, therefore, rightly has not placed any reliance on the say of this witness.

9. It is relevant to note that when it is the say of PW Babuji that on receipt of the information from PW 4 & 5 he had moved in the direction in which the deceased and accused had gone, then PW Babuji should get some corroboration from any of these two witnesses i.e. PW 4 & 5. However, both these witnesses have been declared hostile and they have not said anything which can be said to be incriminating against the accused. The say of these witnesses is that when they were returning from their respective fields to their village, they saw the dead-body of the deceased Popatbhai Mohanbhai lying on the road. So, when the evidence of these two witnesses is not able to carry the case of the prosecution any further, the ld. Trial Judge than was

supposed to consider the other evidence available in the nature of the circumstantial evidence.

10. When it is the say of the prosecution that when deceased Popatbhai was moving towards the house of the accused as he was entitled to have an after-noon meal being the labourer working in the field of the accused as per the village custom, than it can be inferred that the deceased must have an empty stomach. Post-mortem Notes reveal contrary to this aspect and when the doctor who has performed post-mortem, during his deposition, has said that possibility of the death of the deceased beyond 24 hours i.e. even before 24 hours from the time of the post-mortem examination can not be ruled out, than the time of death would be prior to about 8.10 a.m. on 08.06.1985. Of course, there is nothing in evidence, but it is the practice that the agricultural labourers are having their morning break-fast in an early hours of the day. So, it is possible that the deceased may have taken some break-fast in the early hours of the day and, therefore only, some semi-digested food was found in the stomach and some digested food in the small

intestine. Without moving to any surmises, it is possible to infer from the medical evidence vis-a-vis the contents of the post-mortem notes exh.14 that the deceased must not have died after 12.30 or so on 08.06.1985. This situation emerging from the evidence on record affects the version of PW Babuji Mahobataji adversely.

11. The prosecution has not come with specific case as to before how many days or months, Popatbhai was driven out as Bhagiya because of his conduct with the sister of the accused. If it was not in close proximity and when he had worked for some time prior to the date of incident, the event of removal of Popatbhai as a Bhagiya and substitution of his brother Manaji can not be said to be a good piece of evidence to prove the motive. It is true that the prosecution is neither supposed to plead nor prove the motive in the case of direct evidence, but when the present case does not rest only on direct evidence and when specific motive has been pleaded by the prosecution, the prosecution at least to some material extent could have proved the motive. Even Menaben- sister of the accused could have been

examined to prove the negative conduct of deceased Popatbhai.

12. According to us, the discovery panchanama drawn under section 27 of the Evidence Act has not been proved to the satisfaction of the Court. Even the say of the Investigating Officer is also not satisfactory under which this Court can say that section 27 panchanama has been legally proved by the Investigating Officer. It appears to be a recovery of a weapon from a open place. It is rightly argued by ld. Counsel Mr. Barot that the evidence collected by the prosecution qua the muddamal cloths and blood stained weapon has been rightly appreciated by the trial court otherwise it was possible for the IO to send the blood of the accused for analysis so that it can be established beyond doubt that the blood stains found on the cloths put on by the accused is of deceased and the deceased only. After all, the accused is also an agriculturist and the agriculturists and farmers or persons doing labour work in the farm are not able to change their cloths regularly and they also do not wash their cloths regularly. When it is not the opinion of an expert

that stains found on the cloths were fresh, the findings recorded by the ld. Trial Judge is also one of the possible view in the background of the number of decisions of this Court as well as of the Hon'ble Apex Court.

13. For short, in our opinion, the findings recorded by the ld. Trial Judge are based on good logic and legal reasons and there is no element of perversity or patent illegality in the findings recorded by the ld. Trial Judge. Hence, we accept the say of ld. Counsel Mr. Barot for the respondent accused that the finding of the acquittal recorded by the ld. Trial Judge in favour of the respondent accused does not deserve any reversal and the present appeal requires to be dismissed.

14. The reasons given and findings recorded by the ld. Trial Judge in acquitting the respondent accused are legal, sound and based on evidence and are based on correct and legal appreciation of the evidence available on record. There is no perversity or illegality in it and, therefore, we are in full agreement with the view taken by the ld. Trial Judge and hence we are not inclined to grant leave to appeal as prayed. Hence, leave refused. Criminal Appeal, obviously therefore,

fails. The reasons recorded by the learned Judge are logical and there is no element of perversity or patent illegality. The Apex Court in a decision in the case of **Dwarkadas v. State of Haryana, reported in (2002) 1 SCC 204**, has reiterated the principles of law where it has been held that the judgment and order of acquittal normally should not be reversed merely because the other view is possible. In the same way, the observations of the Apex Court in the case of **Kanshiram v. State of Madhya Pradesh (Re.Para-21), reported in AIR 2001 SC 2902,** in respect of appeal against the order of acquittal, positively would help the accused. As per the settled legal position, while appreciating the order of acquittal, the Court should go slow in reversing the order of acquittal unless the order is absolutely illegal and perverse. In view of the ratio of the above cited decision, there is no merit in the present Criminal Appeal and the same is required to be dismissed.

15. In the result, the present appeal is hereby dismissed. The impugned judgment and order of acquittal dated 12.05.1986 passed by the ld. Sessions Judge, Banaskantha at Palanpur in Sessions Case No.50/1985, whereby the ld. Trial Judge has acquitted the respondent accused from the offence punishable under

section 302 of the Indian Penal Code, is hereby confirmed. The respondent accused is on bail, his bail bonds stand discharged.

[C.K. BUCH, J]

[SHARAD.D.DAVE, J]

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